IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

GARNETT WILLIAM CAPE,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5020
WALTER D. ZANT	:	
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Franklin County. Petitioner was convicted of murder and sentenced to death. His conviction and sentence were affirmed by the Supreme Court. Cape v. State, 246 Ga. 520 (1978). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 63 numbered paragraphs, of which 57 allege substantive claims for relief (6-56, amendments 1-6). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the amended petition.

The record in this case consists of the transcript

of the proceedings before this Court on May 19, 1981; the affidavits of Jeanette Shelton, Bobby Jean Phillips, M. I. Cape, and Hasket Cape;[1] the tape recorded depositions of Howard Eisenberg, Dr. Walter F. Rowe, Dr. William Enos, Marjorie S. Fargo, Harold Mauldin, H. V. Kesler, Leroy Lovelace, Louise Lovelace, August Siemon, and Harriett P. Morris; and the transcript and record of Petitioner's trial in the Franklin County Superior Court.

This was the first instance in which this Court allowed testimony to be presented by other than stenographic means - i.e., tape recorded depositions. As the case progressed, or rather failed to progress because of unforeseen difficulties, modifications in procedures became necessary. The court reporter through no fault of her own was unable to transcribe the tapes. The tapes were then returned to Counsel for Petitioner for transcription. Counsel has done so and filed the transcript along with the taped depositions. These factors account for the delay in this case.

6-18

In paragraphs 6-18, Petitioner claims he was denied effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial by Floyd W. Keeble, Jr., and Thomas M. Strickland. Mr. Keeble has

[1] Respondent's motion to exclude the affidavit of Stephen B. Bright is hereby granted. The Court will not consider the affidavit of Mr. Bright as evidence.

been practicing law since 1970. (H.T. 66). For the past three years he has served as Public Defender for the Northern Judicial Circuit. Id. He was appointed to represent Petitioner a day or two after the incident. (H.T. 67). Petitioner's family hired Mr. Strickland to assist. (H.T. 73).

Mr. Keeble was lead counsel. Id. He was responsible for most of the pretrial preparation including motions. (H.T. 73). Mr. Strickland did interview some witnesses but was mainly active during voir dire and conducted most of the sequestered voir dire. Id. Counsel also had an investigator who interviewed all witnesses of whom they were aware with the exception of a couple from the State Crime Lab. (H.T. 67).

Mr. Keeble had access to the State's file. Id. His theory of defense was to rely upon the State to prove Petitioner's guilt with the injection of Petitioner's good character. (H.T. 107).

Among the numerous motions Mr. Keeble filed (R. 8-47) was a motion for a change of venue partially because of an alleged incident at the jail in which Petitioner's life was threatened. (H.T. 68-70). The only evidence presented was the sheriff's testimony because no prisoners who knew about the incident were available to testify. Id. Counsel recalled that the prisoner who had told him of the incident had escaped and was not apprehended until after Petitioner's trial. (H.T. 85). The sheriff stated Petitioner told him of the incident, but the officer was unable to verify it. (T.T. 21 A). With regard to pretrial publicity about

the case, Counsel tried but was unable to secure affidavits or testimony on the community's reaction to the case. (H.T. 69, 77).

Counsel prevailed on his motion for individual, sequestered voir dire and for an independent psychiatric examination. (H.T. 70, 72). However, the voir dire motion was granted only as to certain matters. (H.T. 70). (See paragraphs 19-22 below). Funds for the psychiatric exam were denied by the trial judge; Petitioner's family paid for the exam. (T.T. 12 A; H.T. 72). The results of the exam were not presented at trial because Petitioner was found to be competent. (H.T. 72).

Counsel did not see the need for other experts. (H.T. 74). He did extensively discuss the scientific and autopsy reports and terminology informally with a pathologist. (H.T. 74). The pathologist did not testify, however, because Counsel had no funds for her testimony. (H.T. 90).

In the sentencing phase, Counsel presented evidence of Petitioner's good character in mitigation. In preparation for this phase, Counsel talked at length with Petitioner's son and sister about Petitioner's background. (H.T. 105-106). Counsel also consulted with other family members prior to trial. (H.T. 75). Counsel had asked Petitioner for a list of witnesses and called all of those witnesses except two or three who did not want to testify. Id.

At trial, Counsel made an opening statement

(T.T. 250-251); cross-examined State's witnesses (T.T. 320; 329; 373; 391; 408; 411; 416; 430; 435; 442; 446; 451; 457; 461; 472; 478; 481; 486; 536; 546; 550; 558; 564; 569; 577; 697; 702); made motions (T.T. 268; 291); presented 10 witnesses in the guilt/innocence phase including Petitioner (T.T. 586; 586; 588; 592; 593; 595; 597; 599; 602; 604); gave argument during the guilt/innocence phase (T.T. 739-747) following an argument by Mr. Strickland (T.T. 712-739); gave argument during the sentencing phase (T.T. 793-811) after having presented 6 witnesses (T.T. 777; 781; 781; 783; 784; 785) in addition to Petitioner in his own behalf. (T.T. 787).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. Mr. Keeble was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective in presenting the motion for a change of venue. In that this Court has concluded Petitioner has not

demonstrated a change of venue was necessary (see paragraphs 19-22), the Court cannot conclude Counsel was ineffective in not prevailing on the motion.

Petitioner has also suggested Counsel was ineffective for failing to request all bench conferences be recorded. The Court does not find Counsel ineffective for this reason because Petitioner has not demonstrated any harm from the failure to record. (See Amendment 6).

Finally, Petitioner has contended Counsel was ineffective for failing to object to the testimony of Petitioner's former daughter-in-law, Ola Cape. The Supreme Court found that the trial court did not err in denying Counsel's motion for mistrial on the basis of Ms. Cape's testimony. Cape v. State, supra at 524. Counsel's failure to object contemporaneously to the testimony does not alone make him ineffective, especially in light of the fact that a mistrial was not appropriate.

Petitioner's remaining allegations, such as Counsel should have raised certain issues in his closing arguments or should have properly prepared his witnesses, constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. MacKenna v. Ellis, supra; Pitts v. Glass, supra. Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379 (1975); see Hawes v. State, 240 Ga. 327, 329-330 (1977).

Accordingly, this claim for relief is found to be without merit.

19-22

In paragraphs 19-22, Petitioner contends the trial court erred in denying his motion for a change of venue in violation of his constitutional rights.

FINDINGS OF FACT

Counsel filed a motion for a change of venue because of the size of the community and the nature of the incident. (H.T. 68, 82). There had allegedly been a threat against Petitioner's life at the jail, but there were no prisoners available to testify at the motions hearing who knew of the incident. (H.T. 68). Counsel recalled that the prisoner who had told him of the incident had escaped and was not recaptured until after Petitioner's trial. (H.T. 85). The sheriff testified that Petitioner had told him of the incident, but the officer was unable to verify it. (T.T. 21 A).

Counsel and his investigator tried but were unable to get affidavits or testimony about community reactions. (H.T. 69, 77). Counsel thought that the newspaper accounts, two each in the Athens and Anderson papers and one each in the two local weeklies, were not an undue amount of pretrial publicity. (H.T. 69).

During voir dire, forty-three of the forty-eight members of the array indicated they had read or heard something about the incident prior to trial. (T.T. 5-237). During the individual, sequestered portion of voir dire, one of the two questions asked was whether the juror could lay aside completely anything he or

she had heard and decide the case on the evidence presented in court. (T.T. 183-236). Only one juror indicated he could not be impartial, the reason being his close friendship with Petitioner's son, and was excused for cause. (T.T. 203-207).

CONCLUSIONS OF LAW

A defendant is entitled to a panel of impartial jurors, but this does not require that they be totally ignorant of the facts and issues involved. Mooney v. State, 243 Ga. 373, 385 (1979), citing Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Stevens v. State, 247 Ga. 698, 701 (1981). The test as to whether pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity. Welch v. State, 237 Ga. 665 (1) (1976); Dampier v. State, 245 Ga. 427, 431 (1980).

Here, though forty-three of forty-eight prospective jurors indicated they had read or heard something about the case, no juror expressed a fixed opinion on the issue of Petitioner's guilt or innocence. One juror was excused because he could not be impartial; however, his lack of impartiality was due to his friendship with Petitioner's son rather than any publicity or rumors.

Petitioner has made no showing that the jury selection process showed actual prejudice to render

his trial fundamentally unfair. Mooney v. State, supra, Dampier v. State, 245 Ga. 427, 431 (1980). Neither has Petitioner shown the trial court abused its discretion in denying the motion for lack of evidence on the alleged threat against Petitioner, Mooney v. State, supra.

Accordingly, this claim for relief is found to be without merit.

23-26

In paragraphs 23-26, Petitioner alleges his right to be tried by a fair, impartial, and representative jury was violated by the exclusion of prospective jurors having conscientious or religious scruples against the death penalty.

FINDINGS OF FACT

Only one prospective juror, Patsy Sosby, was excused for cause because of her opposition to capital punishment. (T.T. 219-222). Ms. Sosby indicated she could not consider imposing a death sentence regardless of the trial court's instructions or the evidence that would be developed. Id. Despite efforts by defense counsel to rehabilitate her, Ms. Sosby remained unequivocally opposed to capital punishment and thereafter was excused. Id.

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), jurors may be excused for cause because of their views on capital punishment where they would automatically vote against

the death penalty without regard to evidence which would be developed at trial. Ms. Sosby clearly meets this test and was properly excused.

Accordingly, this claim for relief is found to be without merit.

27-30

In paragraphs 27-30, Petitioner claims his right to a fair trial by an impartial jury was violated by the trial court's refusal to allow complete individual, sequestered voir dire.

FINDINGS OF FACT

Counsel filed a pretrial motion for individual voir dire and sequestration of jurors during voir dire. (R. 32-33). The trial court did not grant the motion in toto but permitted individual, sequestered voir dire on two questions: whether jurors opposed capital punishment and whether jurors could lay aside anything they had read or heard and render an impartial verdict based upon the evidence presented. (T.T. 183-226).

CONCLUSIONS OF LAW

A reading of the voir dire transcript indicates Counsel was permitted a relatively extensive examination of each prospective juror. In each instance that a juror admitted having heard or read something about the case, there is no indication that he or she had formed an opinion on the issue of Petitioner's guilt or innocence.

The request for individual, sequestered voir dire is a matter entirely within the discretion of the trial

court. Whitlock v. State, 230 Ga. 700, 706 (1973); Stinson v. State, 244 Ga. 219, 221 (1979). Petitioner has made no showing of manifest abuse of this discretion. Whitlock v. State, supra; Stinson v. State, supra.

Accordingly, this claim for relief is found to be without merit.

31-34

In paragraphs 31-34, Petitioner claims there was no valid waiver of his right to remain silent and that the introduction of his statements to police violated his constitutional rights.

FINDINGS OF FACT

The trial court conducted a Jackson-Denno hearing and determined that all statements of Petitioner to police were voluntarily made. (T.T. 427-452).

CONCLUSIONS OF LAW

The incriminating statement of which Petitioner complains was made before he invoked his right to remain silent, not afterwards as Petitioner asserts. (T.T. 429), and therefore was properly admitted.

Factual and credibility determinations concerning admissibility of a statement based on voluntariness made by a trial judge are accepted by reviewing courts unless such determinations are clearly erroneous. Johnson v. State, 233 Ga. 58 (1974); Hurt v. State, 239 Ga. 665 (1977).

Petitioner has made no showing the trial court's determination was in error.

Accordingly, the allegation in paragraphs 31-34 is found to be without merit.

35-37

In paragraphs 35-37, Petitioner contends that the admission into evidence of the results of his psychiatric examination violated his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel.

FINDINGS OF FACT

Petitioner underwent a psychiatric evaluation at Central State Hospital pursuant to an order of the trial court. (T.T. 7A-12A, 562). The psychiatrist who conducted the examination testified during the guilt/innocence phase of trial that he had found Petitioner was competent both at the time of the offense and to stand trial. (T.T. 563, 568).

Counsel was successful in moving for an independent psychiatric evaluation of Petitioner, which was paid for by Petitioner's family. (H.T. 71-72). The results of the independent exam were not offered at trial because Petitioner was found competent. Id.

CONCLUSIONS OF LAW

Under authority of Estelle v. Smith, ____ U.S. ____, 101 S.Ct. ____, 68 L.Ed.2d 359 (1981), Petitioner claims that the absence of Miranda warnings prior to and the absence of counsel at the court-ordered exam rendered the psychiatric testimony inadmissible.

In Estelle, the defendant had undergone a court-ordered psychiatric exam and was found competent. The Court found that the use in the sentencing phase of the psychiatrist's testimony to establish the

defendant's future dangerousness, one of three critical issues in determining whether a death sentence would be imposed, violated his privilege against self-incrimination and right to counsel.

Estelle is readily distinguished from the case at hand on the ground that the psychiatric exam in Estelle was not "a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense." 68 L.Ed.2d at 370. In fact, the Court noted that no Fifth Amendment issue would have arisen had the exam been confined to that function. Id.

Here, the psychiatrist merely testified in the guilt/innocence phase as to Petitioner's competency. This finding of competency had been corroborated in an independent exam, though the results were not offered at trial.

Petitioner has not shown that Petitioner was compelled to be a witness against himself. Neither has he shown the court-ordered exam exceeded the scope of a routine inquiry into competency to have become a critical proceeding and require the presence of counsel.

Accordingly, this claim for relief is found to be without merit.

38-39

In paragraphs 38-39, Petitioner claims the testimony of Special Agent R. C. Patterson in the sentencing phase violated his constitutional rights.

FINDINGS OF FACT

Special Agent R. C. Patterson of the Georgia Bureau of Investigation testified to his investigation of the crime scene in the sentencing phase of trial. (T.T. 777-781). When asked by the State to describe the victim's death, the agent responded, "In twenty-three years I've seen a lot of brutal deaths, some maybe as brutal as this, but none any more or more severe than this death of Karen Dove. Added to that, a lot of times if you go to a death, it's an old person; they've lived a life. Karen did not. She was still just a child." (T.T. 780).

CONCLUSIONS OF LAW

The Court acknowledges that upon proper objection the trial court would have excluded the opinion from the agent as to the quantum of brutality involved in the death of the victim. Petitioner's Counsel did not object to the testimony but should have. However, viewed in the context of all evidence in both testimonial and documentary (Photos S-4, S-6 S-7, S-8, S-9, S-10, S-11, S-41) form, the trial court committed no error because no objection was made.

This simply begs the ultimate question: was Counsel ineffective for failing to object? In light of the entire trial and all the evidence before the jury, Counsel might well have concluded that an objection would antagonize the jury more than it would have helped. Whether to object is a tactical

decision which is the exclusive province of a lawyer after consultation with his client. Reid v. State, supra; Hawes v. State, supra.

The Court finds the failure to object was likely to have been harmless in light of all the evidence before the jury.

Accordingly, this claim for relief is found to be without merit.

40-41

In paragraphs 40-41, Petitioner alleges that the prosecutor made improper comments in his closing arguments in both phases of trial which violated Petitioner's Eighth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Cape v. State, supra at 527.

CONCLUSIONS OF LAW

The argument that is improper is that which introduces facts not in evidence and is calculated to prejudice the defendant, not flights of oratory, figurative speech or false logic. Wheeler v. State, 220 Ga. 535, 537 (1965); Leutner v. State, 235 Ga. 77, 84 (1975).

The Court has examined the closing arguments of the prosecutor in both the guilt/innocence and

sentencing phases. (T.T. 710-712, 747-762; 788-793). When read in their entirety, the prosecutor's arguments are not improper. Wheeler v. State, supra; Leutner v. State, surpa.

Accordingly, this claim for relief is found to be without merit.

42-46

In paragraphs 42-46, Petitioner alleges the death penalty is unconstitutionally administered and applied.

Georgia's death penalty statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh den 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

The Court has examined but is not persuaded by the evidence offered by Petitioner.

Accordingly, this allegation is found to be without merit.

47-48

In paragraphs 47-48, Petitioner claims his death is being exacted pursuant to a pattern and practice of Georgia authorities to discriminate on grounds of race, sex, and poverty.

The Court is not persuaded by the evidence offered by Petitioner.

Accordingly, this allegation is found to be without merit.

49-53

In paragraphs 49-53, Petitioner attacks the constitutionality of Georgia's statutory provisions

and practices governing appellate review of death sentences.

Georgia's death penalty statute has been declared constitutional. Gregg v. Georgia, supra.

The Supreme Court of Georgia has conducted its sentence review and concluded Petitioner's death sentence was not excessive or disproportionate. Cape v. State, supra, at 529.

Accordingly, this allegation is found to be without merit.

54-56

In paragraphs 54-56, Petitioner attacks the constitutionality of the use of electrocution as the means by which to administer his death sentence.

The Court finds this allegation to be without merit.

Amendment 1

See paragraphs 6-18.

Amendment 2

The Supreme Court has already concluded that a limiting charge on Ga. Code Ann. §27-2534.1(b)(7) was not required under the facts of the case. Cape v. State, supra at 527.

This Court is unaware of any requirement of specific fact-finding by a jury for (b)(7) other than to find its existence beyond a reasonable doubt.

The Supreme Court has already expressly upheld the charge on mitigating circumstances. Cape v. State, supra at 526.

Accordingly, the allegations in amendment 2 are found to be without merit.

Amendment 3

The Supreme Court has already concluded that the (b)(7) aggravating circumstance was properly applied in this case. Cape v. State, supra at 527.

Amendment 4

The Supreme Court has already concluded that the evidence supports the finding of the (b)(7) aggravating circumstance beyond a reasonable doubt. Cape v. State, supra at 529.

Amendment 5

The Supreme Court has already concluded that the trial court did not abuse its discretion in denying the motion for mistrial on the basis of Ola Cape's testimony. Cape v. State, supra at 524.

The testimony of the forensic seriologist as to the presence of seminal fluid being "weakly suggested" was one result in the series of scientific tests conducted on physical evidence from the scene of the crime. As such, the testimony was relevant and properly admitted.

Accordingly, this claim for relief is found to be without merit.

Amendment 6

In amendment 6, Petitioner claims that the failure to record bench conferences deprived him of his Sixth Amendment right to counsel and Fourteenth Amendment right to due process and equal protection of law.

FINDINGS OF FACT

Though Counsel did not request complete recordation, he stated only one bench conference could possibly have had any effect on future appeals. (H.T. 71). Counsel requested that a black plastic bag be removed from the courtroom because of its odor. Id. He objected to its admission into evidence on grounds of prejudice and relevancy, but the issue was decided adversely to Petitioner on direct appeal. Cape v. State, supra at 524.-

CONCLUSIONS OF LAW

Failure to transcribe bench conferences is not harmful per se; the defendant as appellant must demonstrate harm resulting from the failure to transcribe. Davis v. State, 242 Ga. 901, 903 (1979); Rutledge v. State, 245 Ga. 768, 773 (1980).

Petitioner has not demonstrated any harm or prejudice arising from the failure to transcribe bench conferences.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

This 28 day of October, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1877

SUPREME COURT OF GEORGIA

ATLANTA, February 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GARNETT WILLIAM CAPE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

[20a]

Applic. No. 1877

SUPREME COURT OF GEORGIA

ATLANTA, March 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GARNETT WILLIAM CAPE V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this Application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

[21a]